

The Administrator signed the following rule on September 30, 2005, and we (EPA) are submitting it for publication in the *Federal Register*. While we've taken steps to ensure the accuracy of this Internet version of the rule, it's not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming *Federal Register* publication, which will be available on the Office of Transportation and Air Quality Web site at: www.epa.gov/otaq/url-fr.htm.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[OAR-2002-0042; FRL-XXXX-X]

RIN 2060-AJ97

Control of Emissions of Hazardous Air Pollutants From Mobile Sources:

Default Baseline Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action revises the mobile source air toxics (MSAT) rule's default baseline values for reformulated gasoline and conventional gasoline to reflect the national average toxics performance of gasoline during 1998-2000. EPA's MSAT rule, Control of Emissions of Hazardous Air Pollutants From Mobile Sources (66 FR 17230, March 29, 2001), requires that the annual average toxic performance of gasoline must be at least as clean as the average performance of the gasoline produced or imported during the period 1998-2000 (known as the

“baseline period”). The baseline performance is determined separately for each refinery and importer, and the rule established default toxics baseline values for refineries and importers that could not develop individual toxics baselines. The default toxics baseline values are based on the national average performance of gasoline during the baseline period. However, at the time of the final rule, gasoline toxics performance data were not yet available for the year 2000.

Therefore, the final rule included regulations directing the EPA to revise the default toxics baseline values in the rule to reflect the entire 1998-2000 baseline period once the appropriate data became available. With this action, EPA is revising the default toxics baseline values for refineries and importers to reflect the national average toxics performance of gasoline during 1998-2000.

DATES: This final rule will be effective on **[Insert date 30 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR-2002-0042. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket in the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW, Washington DC. This Docket Facility and the Public Reading Room are open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Christine Brunner, OTAQ, ASD

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SUPPLEMENTARY INFORMATION:

I. General Information

A Does this Action Apply to Me?

This action may affect you if you produce, import, distribute or sell gasoline. The following table gives some examples of entities that may have to follow the regulations.

Category	NAICS ¹ Codes	SIC ² Codes	Examples of Potentially Regulated Entities
Industry	324110	2911	Petroleum Refiners
Industry	422710	5171	Gasoline or Diesel Marketers and Distributors
	422720	5172	
Industry	484220	4212	Gasoline or Diesel Carriers
	484230	4213	

1) North American Industry Classification System (NAICS)

2) Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To decide whether your organization might be affected by this action, you should carefully examine today's action and the existing regulations in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding "FOR FURTHER INFORMATION CONTACT" section.

II. Background

As discussed in the proposal, the regulations promulgated in the final rule, Control of Emissions of Hazardous Air Pollutants From Mobile Sources (66 FR 17230, March 29, 2001), also known as the Mobile Source Air Toxics (MSAT) rule, require that the annual average toxics performance of gasoline produced or imported beginning in 2002 must be at least as clean as the average performance of the gasoline produced or imported during the three-year period 1998-2000 (40 CFR Part 80, Subpart J). Toxics performance is determined separately for reformulated gasoline (RFG) and conventional gasoline (CG).

To establish a unique individual MSAT baseline, EPA requires each refiner and importer to submit documentation (i.e., toxics performance and volume data) supporting the determination

of the baseline. Those refiners and importers who did not have sufficient refinery production or imports during 1998-2000 (based on the criteria specified in §80.855(a) and §80.915(a)) have the default baseline provided in §80.855(b)(1) as their individual MSAT baseline.

As discussed in the rule, the default baseline is based on the average toxics performance of gasoline produced and imported for use in the United States during the baseline period (1998-2000). At the time of the rulemaking, year 2000 batch data from refiners and importers were not available, so EPA included in the regulations an estimate of the default baseline, as well as a requirement at §80.855(b)(2) that EPA update this estimate to reflect the gasoline produced during the entire baseline period, including the year 2000.

EPA issued a proposed rule (70 FR 640, January 4, 2005) which would fulfill the requirement at §80.855(b)(2) to revise the default baseline values. The deadline for requesting a public hearing was January 24, 2005, and for submitting comments, February 3, 2005. No one requested to speak at a public hearing; five comments were received. Copies of the comments on the proposal can be obtained from the docket (see ADDRESSES).

III. Description of Today's Action

A. Default Baseline Values

EPA is finalizing the MSAT default compliance baseline values, or “default baseline

values,” in §80.855(b)(1) as proposed. For RFG, the revised value is 26.78 percent reduction. For CG, the revised value is 97.38 mg/mile. The revised values include the appropriate compliance margins.

Table 1. MSAT Default Baseline Values

		Previous Value (66 FR 17230, 3/29/01)	Today's Action
RFG	1998-2000 Average	26.01	27.48
(% reduction)	Default Baseline Value^	26.71 ¹ (correct value = 25.31)	26.78
CG	1998-2000 Average	92.14	94.88
(mg/mile)	Default Baseline Value^	94.64	97.38

^ Includes compliance margin of 0.7 % reduction for RFG, and 2.5 mg/mile for CG, per §80.915(h)

Today's action promulgates revised default baseline values calculated using the Batch Performance methodology. In the proposal, we presented two calculation methodologies we had evaluated for the purposes of calculating the default baseline values: the Batch Performance method and the Fuel Parameter method. Both use 1998-2000 gasoline property data submitted by refiners and importers. We proposed to use the Batch Performance method because it better reflects and accounts for the actual gasoline (based on composition) that was in the market during 1998-2000. The Batch Performance method also more closely resembles how refiners and importers determine compliance with the RFG and anti-dumping regulations, which is on a batch by batch basis, by analyzing each batch and then determining the average toxics

¹ See the discussion in section "C. Correction".

performance of the batches. All those who commented on this aspect of the proposal supported the Batch Performance calculation methodology as more appropriate than the Fuel Parameter methodology.

All but one of the commenters supported this action to revise the default baseline values. The commenter who did not support the change claimed that the change disproportionately affects blender/refiners and importers. While more blender/refiners and importers than crude-processing refiners are subject to the default baseline, this action simply updates the default baseline values as required by the original MSAT rule and does not change (compared to the original MSAT rule) those who are subject to the default baseline.

Today's action revising the default baseline values was required under 80.855(b)(2). Because today's action completes that requirement, the regulatory language at 80.855(b)(2) is being removed, and that paragraph designated as "Reserved," a term used to maintain the continuity of codification in the Code of Federal Regulations (CFR)².

B. Effective Date

The default baseline values promulgated today will be effective beginning with the 2006 annual compliance period which begins on January 1, 2006. EPA had proposed a start date of January 1, 2005. Most commenters did not support the proposed January 1, 2005, start date,

²Federal Register Document Drafting Handbook, 1991.

though one entity mildly supported that date for the CG revised default baseline value, as that value is less stringent than the value originally promulgated. Those opposed to the 2005 start date stated that it would amount to a retroactive rulemaking (since the requirement would apply as of the January 1, 2005, compliance period but would be promulgated after that date). Most supported a January 1, 2006, start date, provided the final rule was promulgated before September 30, 2005, or more generally, a start date beginning with the next compliance period after promulgation. EPA agrees that a January 1, 2006, start date is more appropriate given the timing of the proposed and the final rules, and is promulgating that start date in today's action. We believe that this start date provides affected parties sufficient lead time to prepare for the changes required by today's action, yet does not further delay any environmental benefits associated with the baseline value revisions.

C. Correction

For the reasons set out in the preamble to the proposed rule, today's action corrects, for calendar years 2002 through 2005, the RFG default MSAT value listed in the March 29, 2001, final rule. In that action, the compliance margin was incorrectly applied to the RFG average toxics reduction estimated for the period 1998-1999. Thus, in addition to promulgating the default toxics baseline that would apply beginning in 2006, today's action also corrects the RFG default toxics baseline applicable to the compliance years 2002, 2003, 2004, and 2005, by appropriately applying the compliance margin to the RFG average toxics reduction estimated in the 2001 final rule. The resulting default RFG baseline is 25.31% reduction.

D. Environmental and Economic Impact

EPA included a discussion of the environmental and economic impacts of the MSAT rule in the March 2001 preamble to the rule. Today's action updating the default baseline values does not significantly change those environmental or economic analyses, though EPA expects that there may be minor impacts. Because the RFG default baseline value becomes slightly more stringent, there may be some cost to affected parties to comply with this revised value. With this slight increase in stringency will likely come a small increase in environmental benefits compared to the current standard. However, it is difficult to estimate the full impact (both economic and environmental) since most of those subject to the MSAT default RFG baseline do not import or produce RFG on a regular basis or do not produce significant quantities of RFG or may never produce RFG. Based on 2003 compliance reports, we estimate that about 40% of the RFG suppliers (refiners and importers) are subject to the MSAT default baseline, and none of those are considered small refiners or importers. In addition, we estimate that these entities supplied less than 10 percent of the RFG volume.

The change in the CG default baseline value may result in an increase in emissions compared to the current standard since the value becomes less stringent as a result of today's action. However, given the discrepancy in CG data quality between the data used in the baseline calculation in the 2001 MSAT rule and in this final action³, it is difficult to fully determine the

³As mentioned in the proposal, during the baseline approval process, many errors were found in the submitted CG data. Thus, the default baseline values in the 2001 MSAT rule were based on a flawed data set, though the best available at the time. The CG default values contained in today's rule are based on corrected batch data as well as (correct) year 2000 data.

environmental impact of this change. In addition, most of those subject to the CG default baseline are importers or blenders who do not produce or import large quantities of CG and/or who produce or import on an irregular basis. The majority of the CG volume is subject to an individual MSAT standard. Thus, for the total pool of CG, the environmental effect of this change in the default baseline is likely to be small.

E. Other Comments

Several commenters addressed issues not part of this rulemaking and therefore beyond its scope. These comments are briefly discussed in a memo to the docket.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 Federal Register 51,735 (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the

environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq because the amendments in this rule do not change the information collection requirements of the underlying MSAT rule.

Burden means the total time, effort, or financial resources expended by persons to

generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a petroleum refining company with fewer than 1500 employees or a petroleum wholesaler or broker with fewer than 100 employees, based on the North American Industrial Classification System (NAICS); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and

(3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's action on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. We have determined that approximately 25 refiners and importers meet the NAICS criteria described above and are subject to the MSAT default baseline for their reformulated gasoline. None of these entities produced or imported RFG during the MSAT baseline period or since then. Based on our knowledge of these refiners and importers, in fact, we would not expect any of them to produce or import RFG in the near future. Thus, we do not expect the revised RFG MSAT default value to adversely impact these small entities compared to the current RFG MSAT default value. In the event these refiners and importers choose to produce or import RFG, they will have had sufficient notice of the standard. Additionally, because the toxics determination is a function of many fuel parameters, as well as the volumes of the batches, the slight increase in stringency of the RFG MSAT default value should not pose a significant burden toward achieving compliance.

Although this final rule will not have a significant economic impact on a substantial number of small entities, the impact of this rule would be reduced for small entities by various provisions in the MSAT rule. The MSAT rule contains deficit and credit carryforward provisions which provide compliance flexibility to regulated entities. Under these provisions, refiners and importers are allowed to carry a toxics deficit (indicating noncompliance with their

MSAT standard) forward for one year, using credits generated in the prior or post years to make up the deficit. The underlying rule also includes a compliance margin to account for ordinary variations in fuel quality. Because RFG toxics performance is a function of many fuel parameters, as well as the volumes of the batches, the slight increase (about 6%) in the stringency of the RFG MSAT default value should not pose a significant burden toward achieving compliance. Beginning in 2006, the requirement that a refiner's or importer's average gasoline sulfur level not exceed 30 ppm should provide additional assistance to regulated entities in complying with the MSAT requirements, since sulfur reductions also decrease toxics emissions, as determined by the Complex Model.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent

with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's action simply modifies the original rule in a limited manner, and would not significantly change the original rule. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, because it applies only to parties which produce or import gasoline.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule amends existing regulatory provisions applicable only to producers and importers of gasoline and does not alter State authority to regulate these entities. The amendments will impose no direct costs on State or local governments. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal

Governments” (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. The rule amends existing regulatory provisions applicable only to producers and importers of gasoline and will impose no direct costs on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children from Environmental Health & Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62FR19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental

health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined in Executive Order 12866 and it is based on technology performance and not on health or safety risks.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”(66 Fed. Reg. 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5

U.S.C. 804(2). This final rule will be effective on **[Insert date 30 days after date of publication in the FEDERAL REGISTER]**.

Statutory Provisions and Legal Authority

The statutory authority for the fuels controls in today's final rule can be found in sections 202 and 211(c) of the Clean Air Act (CAA), as amended. Support for any procedural and enforcement-related aspects of the fuel controls in today's rule, including recordkeeping requirements, comes from sections 114(a) and 301(a) of the CAA.

List of Subjects

List of Subjects in 40 CFR Part 80

Administrative practice and procedure, Air pollution control, Confidential business information, Environmental protection, Gasoline, Labeling, Motor vehicle fuel, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements

Dated:_____

Stephen L. Johnson, Administrator

For the reasons set forth in the preamble, 40 CFR part 80 is amended as set forth below:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545, and 7601(a).

2. Section 80.855 is amended by removing and reserving paragraph (b)(2) and revising paragraphs (b)(1)(i) and (b)(1)(ii) to read as follows:

§ 80.855 What is the compliance baseline for refineries or importers with insufficient data?

* * * * *

(b)(1)* * *

(i) For conventional gasoline, prior to January 1, 2006, 94.64 mg/mile; starting January 1, 2006, 97.38 mg/mile.

(ii) For reformulated gasoline, prior to January 1, 2006, 25.31 percent reduction from statutory baseline; starting January 1, 2006, 26.78 percent reduction from statutory baseline.

(2) **[Reserved]**

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